Office-Supreme Court, U.S.
FILED
AUG 31 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 443

HUGHES TOOL COMPANY
and
RAYMOND M. HOLLIDAY, *Petitioners,*
v.
TRANS WORLD AIRLINES, INC., *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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August 31, 1964

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Petitioners Hughes Tool Company ("Toolco") and Raymond M. Holliday ("Holliday") pray that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to review its judgment, entered June 2, 1964, on an appeal, pursuant to 28 U.S.C. § 1292(b), from an order of the United States District Court for the Southern District of New York.

OPINIONS BELOW

The opinion of the District Court is reported at 32 F.R.D. 604 and said opinion and the orders thereon are printed in Appendix A hereto, page 1a. A prior

opinion of the District Court, denying a motion of Toolco to dismiss the complaint, is reported at 214 F. Supp. 106.

The opinion of the Court of Appeals is reported at 332 F.2d 602 and is printed in Appendix B hereto, page 7a.

JURISDICTION

The judgment of the Court of Appeals was entered on June 2, 1964[1] (A-994).[2] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Where the Civil Aeronautics Board has approved the acquisition of a controlling stock interest in an air carrier by a person engaged in a phase of aeronautics and has further approved or has jurisdiction to approve all relevant transactions between them under an Act which immunizes the approved transactions from the antitrust laws, does the district court have jurisdiction to entertain a complaint by such air carrier alleging that the transactions between the subsidiary air carrier and its parent violated the antitrust laws in that they constituted a conspiracy, an attempt to monopolize and an acquisition in violation of the antitrust laws?

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[1] On the same date the Court of Appeals also entered a judgment with respect to counterclaims filed by Toolco against TWA and certain additional defendants. This judgment is the subject of a separate petition for a writ of certiorari to be filed shortly.

[2] References to (A-) are to the pages of the Appendix to Brief of Defendants-Appellants filed in this case (No. 24805) with the Court of Appeals. The judgment, however, is inserted only in that copy of the Appendix which has been made a part of the certified record filed with this petition.

2. Should a district court accord the Civil Aeronautics Board primary jurisdiction to determine the scope of an antitrust exemption conferred by the Board?

3. Where the Civil Aeronautics Board has approved the acquisition of control by a person engaged in a phase of aeronautics over an air carrier and has also approved all pertinent transactions between the controller and the air carrier, can exclusive dealing between the controller and the air carrier constitute a violation of the antitrust laws?

STATUTES INVOLVED

The statutory provisions involved are Sections 102, 408, 411, 414, 415, 1005(a) and (d) of the Federal Aviation Act of 1958 (49 U.S.C. §§ 1302, 1378 as amended in 1962, 1381, 1384, 1385, 1485(a) and (d)), Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2), and Sections 3, 4, and 7 of the Clayton Act (15 U.S.C. §§ 14, 15 and 18).

Section 408(a) of the Federal Aviation Act[3] (49 U.S.C. § 1378(a)) provides, *inter alia*:

> "It shall be unlawful unless approved by order of the Board as provided in this section—
>
> ". . . .
>
> "(5) For any air carrier or person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever;"

[3] The Federal Aviation Act of 1958 superseded the Civil Aeronautics Act of 1938. Inasmuch as the pertinent provisions of the two statutes are substantially identical, all references herein will be made to the Federal Aviation Act (the "Act").

Section 414 thereof (49 U.S.C. § 1384) provides:

> "Any person affected by any order made under sections 408, 409, or 412 of this Act shall be, and is hereby, relieved from the operations of the 'anti-trust laws', . . . and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order."

The pertinent statutory provisions are reprinted in full in Appendix C hereto, p. 32a.

STATEMENT OF THE CASE

Respondent Trans World Airlines, Inc. ("TWA") is one of the country's leading airlines. Petitioner Toolco, a firm primarily engaged in the manufacture and sale of equipment to the oil well drilling industry, owns more than 78 per cent of the capital stock of TWA.[4] Petitioner Holliday is one of Toolco's officers and directors.[5]

CAB Regulation of Toolco-TWA Relationship

The Toolco control over TWA has been approved by the CAB, and has been subject to the continuing jurisdiction of the Board.

The acquisition by Toolco of an approximately 45 per cent interest in TWA was approved by the CAB in 1944. *Transcontinental & Western Air, Inc., Control by Hughes Tool Co.*, 6 C.A.B. 153 (1944). Such

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[4] In December 1960 Toolco's stock in TWA was placed into a voting trust as a condition imposed by certain lending institutions for the supplying of financing to TWA for the acquisition of jet aircraft.

[5] Howard R. Hughes, who was named as a defendant but never served with process, is the sole stockholder of Toolco but since December, 1960 has not been an officer or director thereof.

approval was required under Section 408 of the Act which makes the acquisition of control of an air carrier by a person engaged in a "phase of aeronautics" unlawful absent a Board determination, after a hearing, that such control is "consistent with the public interest." Toolco was held to be a "dealer" in aircraft and therefore subject to this provision because it had ordered aircraft under contracts assigned to TWA but subject to certain option rights retained by Toolco. (6 C.A.B. at 156.)

The Board approval of control was granted after a careful consideration of the potential problems inherent in Toolco's activities as a "dealer" in aircraft, and subject to stringent conditions to "insure against any temptation which might later come to the applicant [Toolco] to take advantage of the relationship to its own profit and to the detriment of the public interest." (6 C.A.B. at 156.)

The order granting approval to the control relationship provided:

> "That said approval shall be effective so long as commercial transactions between TWA and Hughes Tool Company . . . are limited to transactions involving complete items of property, the price of which does not exceed $200 each, with the further limitation that the total annual expenditure involved in such commercial transactions by either party shall not exceed $10,000;" (6 C.A.B. at 158.)

In 1947 Toolco entered into a letter agreement with TWA by terms of which it could increase to over 70 per cent its stock ownership in TWA. The CAB, on its own initiative, ordered a hearing to determine whether such an increase required approval pursuant

to Section 408 of the Act. *Transcontinental & Western Air, Inc., Further Control by Hughes Tool Co.*, 9 C.A.B. 381 (1948). The CAB order setting such a hearing expressly recognized that under the letter agreement Toolco would acquire absolute control over TWA's acquisition of aircraft.[6]

The Board, after a public hearing, entered an opinion and an order approving the increased control under Section 408 of the Act. *Trans World Airlines, Further Control by Hughes Tool Co.*, 12 C.A.B. 192 (1950). Such approval was based on an exhaustive review of Toolco's "plans and policies with respect to the controlled carrier". (12 C.A.B. at 196), including Toolco's policy with respect to equity financing by TWA, the acquisition of aircraft by TWA from Toolco or with its financial and technical assistance. The Board cited as significant considerations in favor of approval "the contributions of Toolco and Mr. Hughes in the way of financial support to the carrier, [and] in the selection and purchase of its equipment . . ." (12 C.A.B. at 216).

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[6] It stated:

> "Significant also is the fact that under the supplementary agreement of December 26, 1947, modifying the letter agreement, TWA *was required to come to Toolco to obtain consent of the latter before purchasing additional equipment.* Certainly this transaction also represents an element of new and increased control arising out of the letter agreement." (9 C.A.B. at 391, n. 18; emphasis supplied).

The CAB, in ordering a hearing as to whether such increased control was in the public interest, followed the recommendation of its Examiner who had concluded

> ". . . Accordingly, the acquisition or potential acquisition, wholly at Toolco's option, of a majority or two-thirds stock ownership in TWA creates in Toolco, alone, the power of change and of life and death over TWA." (A-267)

The 1950 order approving the acquisition of further control continued in force the provisions of the 1944 order for the retention by the CAB of jurisdiction over all significant transactions between Toolco and TWA (12 C.A.B. at 225).

During the period of Toolco control over TWA, Toolco and TWA entered into a number of commercial transactions relating to the acquisition of flight equipment by TWA from Toolco through purchases and leases from Toolco and by obtaining financial assistance from Toolco for purchases by TWA from others. The terms and conditions of these transactions were approved by the Board through modification of the original orders approving Toolco's control over TWA. The nineteen such modification orders so issued included, as the Court of Appeals noted, "modification orders approving the specific transactions involving the acquisition of jet aircraft which are the subject matter of this litigation." (332 F.2d at 610). Each of these modification orders "approving the specific transactions . . . which are the subject matter of this litigation" (ibid) stated that the transactions

> "do not violate the original purpose of the Board in imposing the restrictions contained in Order No. 3210 [the original approval order] . . ."

and that the modification as ordered was

> "just and reasonable and in the public interest." (E.g., A-200)

Furthermore, the Board retained jurisdiction over each of these approved transactions by making each such order subject to being "amended or revoked at any time in the discretion of the Board without hearing." (A-199-227)

The Proceedings Below

The action was commenced on June 30, 1961, by the filing by TWA of a complaint seeking divestiture of Toolco's 78 per cent stock interest in TWA, other injunctive relief and treble damages by reason of alleged violations of Sections 1 and 2 of the Sherman Act and Sections 3 and 7 of the Clayton Act (A-1). Since both TWA and Toolco are Delaware corporations, federal jurisdiction, if any, is solely dependent upon the alleged violations of the antitrust laws.

In the words of TWA counsel the "crux" of the violations charged in the complaint "rests upon Toolco's acts and efforts, through the exercise of its stock control over TWA, to control and dictate the manner and method by which TWA acquired aircraft and the necessary financing therefor . . ."[7]

The allegations of the complaint which the Second Circuit apparently found to state a cause of action under the antitrust laws are

1. "that Toolco refused to finance aircraft acquisitions by TWA unless TWA agreed to purchase planes from no supplier other than Toolco" (332 F.2d at 611),

2. "that Toolco required TWA generally to boycott all other suppliers of aircraft" (*Ibid.*);

3. "that the defendants have attempted through various means to monopolize a substantial segment of interstate and foreign air commerce" [the furnishing of aircraft to TWA.] (*Ibid.*).

The complaint also charges antitrust violations arising out of:

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[7] "Plaintiff's Points and Authorities (A) In Reply to the Opposition to Plaintiff's Motion and (B) In Opposition to Defendant's Motion," p. 5, filed August 7, 1961 (R 129, R 134). "R" refers to the pages of the record in the District Court.

1. Toolco's acquisition of control over TWA (which has been expressly approved by the Board.)

2. The attempted merger of TWA with Northeast (which was subject to CAB approval.)

3. The attempt by Toolco in 1961 to induce TWA to acquire certain aircraft.

The answers of Toolco (A-31) and Holliday (A-144) deny allegations of antitrust violations in the complaint. They plead as defenses, *inter alia,* that the TWA complaint fails to state a claim upon which relief can be granted and that subject matter jurisdiction is lacking because the CAB (i) had authorized or approved the acquisition and exercise of control by Toolco over TWA, (ii) had retained jurisdiction over all significant transactions between Toolco and TWA and (iii) had pursuant to such retained jurisdiction approved each and every significant transaction between Toolco and TWA, including the terms and conditions upon which Toolco supplied financial assistance or equipment to TWA.

On February 7, 1963, the District Court denied Toolco's motion to dismiss the complaint (214 F. Supp. 106). Toolco's motion was made on the grounds (i) that the transactions which were alleged in the complaint to violate the antitrust laws had been exempted from or were not subject to the antitrust laws or (ii) that the subject matter of the complaint was within the primary jurisdiction of the CAB.

On February 8, 1963, following the denial of Toolco's motion to dismiss and prior adverse rulings of the District Court on important discovery matters which denied to Toolco, prior to being subjected to

discovery, the ultimate facts on which TWA relied,[8] Toolco elected to rest on the merits of the positions it had taken so as to obtain appellate review of decisions it believed erroneous and which would cause it irreparable injury. By reason of Toolco's election, the District Court, on May 3, 1963, entered its order of default judgment against Toolco pursuant to Rule 37(b)(2)(iii) and 37(d). The court referred the case to the Special Master to determine the amount of damages to be awarded to TWA and permitted TWA to amend its complaint to increase the amount of damages claimed to $145,000,000. The court reserved for itself a determination as to the propriety of granting TWA's request that Toolco be required to divest itself of its 78 percent interest in TWA. (32 F.R.D. 604, also Appendix A *infra*).

The District Judge certified the order for an interlocutory appeal in advance of the probably "prolonged" hearing on damages because

> ". . . this order involves a controlling question of law (see Pan American World Airways, Inc. v. United States, 371 U.S. 296, 83 S.Ct. 476, 9 L.Ed. 2d 325 (1963)) as to which there is a substantial ground for difference of opinion." (32 F.R.D. at 608).

[8] The District Court had entered orders (1) denying, despite the recommendation of J. Lee Rankin, Esq., who had been appointed as Special Master to preside over the conduct of discovery, pretrial procedures under Rule 16 of the Federal Rules of Civil Procedure to limit the issues and to ascert in the factual contentions of the parties, and (2) modifying prior rulings of the Special Master so as not to require TWA to answer until 60 days after the completion of the enormously expensive deposition of Mr. Hughes, interrogatories designed to ascertain what facts TWA claimed existed to support the conclusory allegations of the complaint.

The Court of Appeals granted an interlocutory review of the order of the District Court, but limited the appeal to two questions:

> ". . . (1) Whether the U. S. District Court for the Southern District of New York had jurisdiction of the action, and (2) Whether the exercise of its regulatory power by the Civil Aeronautics Board in the premises by issuance of orders permitting defendants to act as defendants acted constitutes a good defense to the anti-trust claim of [TWA] . . ." (Order of June 6, 1963, A-138)

Accordingly, the propriety of the grant of the default judgment was not before the Court of Appeals and is not a subject of this petition.[9]

The Decision of the Court of Appeals

The Court of Appeals in affirming the decision of the District Court held that:

1. The District Court had jurisdiction under the antitrust laws over the acts charged in the complaint, and could exercise that jurisdiction without regard to CAB jurisdiction over the same acts.

2. The CAB approval of the transactions in question in this litigation did not provide a defense to the claims asserted herein.

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[9] The Court of Appeals did consider the propriety of the District Court's entering a default judgment dismissing with prejudice five counterclaims asserted by Toolco in this case, and in so doing it relied on Toolco's actions with respect to discovery proceedings on the complaint. The propriety of such an imposition of sanctions under Rule 37, F.R.C.P., by reason of Toolco's conduct with respect to the complaint is in part the subject of the Petition for a Writ of Certiorari being filed by Toolco to review the judgment of the Court of Appeals entered with respect to these counterclaims.

3. The allegations of the complaint stated a cause of action under the antitrust laws.

REASONS WHY THE WRIT SHOULD BE GRANTED

This case presents crucial questions relating to the demarcation, in industries which are subject to administrative control, of the line between the regulatory scheme of the administrative agencies and the command of the antitrust laws that unfettered competition shall govern. The demarcation of the line is difficult but it must be drawn; otherwise, as this Court said in *Pan American Airways* v. *United States*, 371 U.S. 296, 310, "two regimes might collide." This Court has long been concerned with this problem. Its concern culminated in the recent decision in the *Pan American* case (*Panagra*).

The *Panagra* decision clearly represents a landmark opinion in this field of law. Confusion as to the meaning and scope of this significant decision is likely to result if the decision of the Court of Appeals in this case, which stands in plain conflict with *Panagra*, is not reviewed.

This case also presents connected issues of great importance which were not decided by this Court in *Panagra* or in any other previous decisions. These relate to (1) the scope and effect courts must give to agency approval of transactions under a statute conferring antitrust immunity to such approved transactions and (2) the impact of the antitrust laws on exclusive dealings between a parent and a subsidiary where the parent's acquisition of control over the subsidiary has been exempted from the antitrust laws by agency action. The resolution of these issues is vital

to the administration of the Federal Aviation Act, similar regulatory statutes and the antitrust laws.

I. The Conflict With Panagra

The decision of the Court of Appeals is clearly in conflict with this Court's decision in *Panagra*.

The *Panagra* decision arose out of a Government civil antitrust complaint which charged that the defendants, Pan American and W. R. Grace & Co., a shipping common carrier, had established a Latin American airline joint venture, Panagra, pursuant to an agreement that Panagra would have the exclusive right to traffic along the west coast of South America and Pan American was to be free of competition from Panagra elsewhere in South America. The complaint also charged that Pan American used its 50 percent control over Panagra to prevent it from applying to the CAB for a route from the Canal Zone to the United States.

This Court ordered dismissal of the complaint on the ground that the antitrust laws were not applicable to the acts charged. It held that the alleged anti-competitive aspects of such acts are "peculiarly a question for the Board," (371 U.S. at 309), and must be judged by it under the unfair competition section (§ 411) of the Federal Aviation Act.

The controlling considerations in this Court's holding in *Panagra* appear to have been the following:

1. The existence of statutory provisions, §§ 408, 409 and 411 of the Federal Aviation Act, under which "[t]he Board in regulating air carriers is to deal with at least some antitrust problems" (371 U.S. at 304).

2. The acts charged in the complaint "as antitrust violations are precise ingredients of the Board's authority" (371 U.S. at 305).

3. The Board has the power under the Act to give "immunity from antitrust violations 'insofar as may be necessary to enable such person to do anything authorized . . . by such order'." (371 U.S. at 309.[10])

4. The fact that the Board's "power to order divestiture under § 411 . . . seems clear" (371 U.S. at 312).

As shown below, precisely the same considerations are present with equal force in the present case.

1. We start with the proposition, as did this Court in *Panagra*, that the Federal Aviation Act empowers the Civil Aeronautics Board to consider and, where appropriate, to enforce antitrust objectives.

Section 408 of the Act, like the unfair competition section involved in *Panagra*, requires the Board to consider relevant antitrust problems. As this Court noted in *Panagra*, "The Board in regulating air carriers is to deal with at least some antitrust problems" under § 408 as well as under § 411 (371 U.S. at 304). Moreover, it is the plain purpose of § 408 to empower the Board to deal with the possible

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[10] *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 351 contains the following comment on *Panagra*:

> "In Pan American, the Court held that because the Civil Aeronautics Board had been given broad powers to enforce the competitive standard clearly delineated by the Civil Aeronautics Act, and to immunize a variety of transactions from the operation of the antitrust laws, the Sherman Act could not be applied to facts composing the precise ingredients of a case subject to the Board's broad regulatory and remedial powers;"

anticompetitive effects implicit in the control of an air carrier by a competitor or supplier. Indeed, the Board is enjoined from approving under § 408 any affiliation "which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier . . . . ."

2. In *Panagra*, this Court held that the acts alleged with respect to W. R. Grace & Co. were "precise ingredients" of the Board's regulatory authority in the "allowing or disallowing of affiliations between common carriers and air carriers." (371 U.S. at 305) The transactions which are the subject of the present case are "precise ingredients" of the Board's closely analogous power under the same section of the Act (§ 408) in the "allowing or disallowing" of affiliations between a person engaged in a "phase of aeronautics" and an air carrier.[11]

Under § 408 such affiliations are unlawful unless approved by the Board as "consistent with the public interest" and the Board can retain jurisdiction over the relationship by attaching appropriate conditions to its approval order.

The Board has exercised in full its power under § 408 with respect to the matter in controversy here by (1) approving Toolco's control over TWA, (2) retaining jurisdiction over all major transactions between the two companies, (3) exercising that jurisdiction by approving as being in the public

[11] § 408 was not directly involved in *Panagra*, however, because there the common carrier, W. R. Grace & Co., had acquired control before the enactment of this section. The Court, however, in holding that § 411 has superseded the antitrust laws with respect to the acts charged in the complaint, equated the powers of the Board under § 411 with those under § 408.

interest the very transactions attacked in the complaint in this case and (4) retaining its jurisdiction over these transactions by making its approval subject to amendment or revocation.

In *Panagra,* the acts which this Court held to be "precise ingredients" of the Board's regulatory authority were similar in character to the acts involved here in that both entail the alleged misuse, in violation of the Sherman Act, of a stockholder's power to control an air carrier. In addition, in each case a stockholder involved is not itself engaged in air transportation and therefore probably not subject to the Board's general jurisdiction. See *Panagra,* 371 U.S. at 310, n. 14.

3. The same Act which this Court held gives the CAB the power to "immunize a variety of transactions from the antitrust laws," (*United States* v. *Philadelphia National Bank, supra,* commenting on *Panagra*) is applicable here. This power to immunize is even more directly involved in this case. The Board can confer antitrust immunity under § 408 of the Act while it has no similar power under § 411, the specific provision of the Act involved in *Panagra.*

4. The Board's power under § 408 to compel the requested divestiture of Toolco's control over TWA is equivalent to its power under § 411 to order Pan American to divest itself of Panagra. Indeed, in *Panagra,* this Court derived the Board's power of divestiture under § 411 largely from the fact that the Board, as it has done here, "could have retained such power over these transactions [under Section 408], if they had occurred after 1938, by so conditioning its grant of approval." (371 U.S. at 312).

The TWA complaint also demands damages, relief not available in Board proceedings. Damages, how-

ever, may not be awarded until after the Board has determined the issues presented by the complaint. In *Pauagra*, this Court, relying on its recent decision in *Hewitt-Robbins, Inc.* v. *Eastern Freight-ways, Inc.*, 371 U.S. 84, indicated that "[i]f it were clear that there was a remedy in this civil antitrust suit that was not available . . . before the CAB," it would be appropriate for the litigation to be "held by a court until the basic facts and findings are first determined by the administrative agency, so that the judicial remedy, not available in the other proceeding, can be granted." (371 U.S. at 313, n. 19). See also *S.S.W., Inc.* v. *Air Transport Ass'n. of America*, 191 F.2d 658 (D.C. Cir. 1951) *cert. denied*, 343 U.S. 955.

II. The Scope and Effect of Antitrust Immunity Granted By the Federal Aviation Act and Similar Regulatory Statutes

This case also raises important questions as to the scope and effect to be accorded by the courts to the antitrust immunity bestowed, under the applicable regulatory statute, by an order of an administrative agency granting approval to a given transaction. These questions have not yet been resolved by this Court.

As shown above, Toolco's acquisition of control over TWA, as well as the specific transactions which are the subject matter of this complaint, have been approved by the Board pursuant to the provisions of § 408 of the Act. Under § 414 of the Act any action authorized or approved by an order under § 408 is granted immunity from the antitrust laws.

Nevertheless, the Court of Appeals held that the transactions in question here were not exempted from the antitrust laws. It agreed with the District Court

that the orders approving the acquisition by Toolco of control over TWA did not exempt conduct in the exercise of control from the antitrust laws and held that the specific transactions which are the subject matter of the complaint and were each approved as being in the public interest by the Board were not exempt from the antitrust laws because the Board did not have before it for approval "the backdrop against which these transactions were effected." (332 F.2d at 610).

These holdings assume legal propositions which, particularly in the light of previous decisions, are of questionable validity, and which, because of their importance to the administration of the Federal Aviation Act and the antitrust laws, should be reviewed by this Court.

A. The Second Circuit has limited the immunizing effect of an order under § 408 approving control of an air carrier to the naked act of acquisition. But an acquisition of control may have anticompetitive aspects only by reason of the potential exercise of that control. Accordingly, the antitrust immunity, which § 414 attaches to Board approval of control under § 408, would be almost meaningless if it did not extend to its exercise. *Cf., Putnam* v. *Air Transport Ass'n.*, 112 F. Supp. 885 (S.D.N.Y. 1953). The exercise of such control is, of course, subject to any limitations the Board order of approval may contain and to the Board's continuing jurisdiction over the control relationship pursuant to which it may investigate the exercise of the control and further restrict it by modification of the approval order.[12] See Sections 407 (e), 408 (d), 415, and 1005(d) of the Act.

[12] TWA admittedly does not claim that Toolco violated any order of the CAB (A-281).

B. The Second Circuit undertook, in a private antitrust action, to determine the scope of an alleged antitrust exemption bestowed by virtue of agency action without referring the matter to the agency which granted the exemption. The action of the court below, if allowed to stand, will produce the very conflict with the administrative agency concerning which this Court warned in *Panagra*. As was said in the opinion in *Panagra*, "If the courts were to intrude independently with their construction of the antitrust laws, two regimes might collide" (371 U.S. at 310). Where there is a question as to the scope of the exemption, the better approach, more consistent with prior decisions, is for the Board to rule initially on the precise extent of the exemption it has granted. See *United States* v. *Railway Express Agency*, 89 F. Supp. 981, 987 (D. Del. 1950); *cf.*, *Far East Conference* v. *United States*, 342 U.S. 570.

In this case, the Board in approving the Toolco-TWA transactions may well have assumed that TWA would deal exclusively with its parent, Toolco, and that Toolco would control TWA's acquisition of aircraft.[18] The Board, therefore, may have intended the exemptions granted to be broad enough to include such a restrictive condition, and to bar the antitrust claims made in TWA's complaint.

C. The Second Circuit's holding further assumes that the courts have the power to strip antitrust immunity from Board-approved transactions, on the assumption that the Board was not aware of the "back-

[18] The strong possibility that the Board may have made such an assumption is indicated by this Court's statement in *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 523, to the effect that "[a] subsidiary will in all probability deal only with its parent for goods the parent can furnish."

drop" of such transactions, without a prior referral of such matters to the Board.

There would appear to be serious doubt as to whether such action by the courts can be reconciled with the established doctrine of primary jurisdiction in the administrative agencies. An initial decision by the Board seems essential here because the Board, after considering the TWA charges, may keep in effect its order approving the transactions thereby immunizing them from the antitrust laws. See *Far East Conference* v. *United States, supra*.[14] Such primary jurisdiction on the part of the Board is also indicated by the Board's retention of jurisdiction over the approved transactions by making the approval orders subject to amendment or revocation.[15]

In any event, whether or not the Board was aware of the "backdrop" to the approved transactions would seem to be a question which only the Board may properly determine. Otherwise, the requisite finality to administrative orders would be lacking and they

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[14] Also, as Mr. Justice Brennan noted in his dissenting opinion in *Panagra*, 371 U.S. at 332:

> "The tendency of the cases has been to invoke the doctrine [i.e., primary jurisdiction] not when there are simply overlapping judicial and administrative remedies for the same conduct, as is the case here, *but only when 'there is a possibility that a subsequent administrative decision would approve the questioned activities . . .'*" (Emphasis supplied)

[15] The CAB on July 10, 1964, entered an order (Order No. E-21057) which stated, *inter alia*, that Toolco might take the requisite steps to purchase certain notes and terminate the Voting Trust as soon as it submits a satisfactory plan effectively to divest itself of the power to control both TWA and Northwest Airlines, Inc. (of which Toolco acquired control in 1962). This order was issued with full knowledge of TWA's complaint and the proceedings in the litigation.

would always be subject to collateral attack on the ground that the agency was not fully aware of what it was doing.

III. The Legality of the Challenged Transactions Under the Antitrust Laws

This case also presents important and novel antitrust issues. These relate to the propriety of exclusive dealing arrangements between parent and subsidiary where the acquisition of the stock of the subsidiary has been exempted from the antitrust laws or is otherwise not in violation thereof.

It is clear the CAB orders approving the Toolco acquisition of control over TWA exempted that acquisition from the operation of the antitrust laws under § 414. Indeed the District Court so held. In its opinion denying Toolco's motion to dismiss the complaint, the Court said:

> "The antitrust violations that could possibly be present in such acquisition—that it was a contract in restraint of trade prohibited by section 1 of the Sherman Act, or was an attempt to monopolize prohibited by section 2 of the Sherman Act, or was an acquisition of stock prohibited by section 7 of the Clayton Act—were within the contemplation of the approval orders and protected by the exemption provided by section 414." (214 F. Supp. at 109).

Accordingly, in order for there to have been a violation of the antitrust laws, the conduct alleged in the complaint must have exceeded the permissible bounds of conduct by a parent in dealing with its subsidiary.

The Court of Appeals found that under concepts of notice pleading the complaint sufficiently stated

"the outlines of a tying arrangement, an economic boycott of the defendants' competitors, and an attempt to monopolize commerce . . . ." (332 F.2d at 611.) Even a cursory reading of the complaint makes clear that the most that can be said for these allegations in the complaint is that the aircraft manufacturers were prevented from selling their planes to TWA except through its parent, Toolco. However, the exclusive dealing related not to a product manufactured by the parent but to one which it acquired from other manufacturers and then made available to the subsidiary. The alleged exclusive dealing did not operate to foreclose any manufacturers from the alleged market represented by TWA's requirements. For example the only possible "boycott" alleged in the complaint is that Toolco determined that it would order jet aircraft from Boeing and Convair for TWA rather than having TWA order jet aircraft direct from Boeing and Convair (Par. 17, A-12). For a majority stockholder to order aircraft for use by its subsidiary rather than to have the subsidiary place orders for the same aircraft does not, however, constitute a "boycott" of suppliers of aircraft other than Toolco because there is no refusal to deal with any manufacturer and the manufacturer is not foreclosed from supplying aircraft in the market represented by the requirements of TWA.

The effect of the opinion of the court below is to make it a violation of the Sherman and Clayton Acts for a parent to determine with whom the subsidiary shall deal. As stated by the Report of the Attorney General's Committee to Study the Antitrust Laws, p. 35 (1955):

"It seems inconceivable to hold *per se* illegal the mere fixing by a parent of a subsidiary's price or production, or *the selection by the parent of those persons with whom its subsidiary may or may not deal.*" (Emphasis supplied)

CONCLUSION

For the reasons stated the writ should be granted.

Respectfully submitted,

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August 31, 1964